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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

IBP, INC.,

Petitioner,

v.

HUGHES A. BAGLEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ARGUMENT:

I. UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD THAT THE FIRST AMENDMENT DOES NOT REQUIRE A PRIVATE-FIGURE LIBEL PLAINTIFF TO PROVE *NEW YORK TIMES* ACTUAL MALICE IN ORDER TO RECOVER COMPENSATORY DAMAGES. 6

II. THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT BAGLEY WAS A PRIVATE FIGURE. 8

III. AN INDEPENDENT REVIEW OF THE RECORD SUPPORTS THE TRIAL COURT'S JUDGMENT. 9

IV. THE PARTIES IN THIS LITIGATION HAD A FAIR TRIAL. 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Arnold v. Eastern Airlines, Inc., 681 F.2d 186, 198 (4th Cir. 1982) 11

Bagley v. IBP, 755 F.2d 1300 (8th Cir. 1985) 8, 9

Bose Corp. v. Consumers Union of the United States, 104 S.Ct. 1949 (1984) 9, 11

Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965), Aff. 388 U.S. 130, 18 L.Ed.2d 294, 87 S.Ct. 1975 (1967) 11

Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L.Ed. 2d 789, 94 S.Ct. 2997 (1974) 6, 7, 10

McDonald v. Smith, 472 U.S. —, 86 L.Ed.2d 383, 105 S.Ct. 2787 (1985) 6, 7, 8

Philadelphia Newspapers v. Hepps, 475 U.S. —, 89 L.Ed.2d 783, 106 S.Ct. 1558 (1986) 7

STATEMENT OF THE CASE

This controversy does not really begin with the hearings in 1977 before the Subcommittee on General Small Business Problems of the U.S. House of Representatives Committee on Small Business ("Subcommittee") as IBP states in its Petition for a Writ of Certiorari. Rather, it relates back to a time even before Hughes A. Bagley's employment with IBP. It begins with the misrepresented yields in the IBP Cattle Pak pricing formula in the late 1960s, IBP's peculiar preferential pricing arrangement with the Waldbaum chain of supermarkets which a jury found to be in violation of the Robinson-Patman Act, the circumstances surrounding IBP's entry into the New York boxed beef market, IBP's quantity discount program in the 1970s, and its termination of Bagley's employment in July, 1975.

This controversy goes back to those days because, in describing Bagley's testimony as it pertained to those events and/or subjects, IBP, in its defamatory letter stated that Bagley's testimony was ". . . malicious—even perjurious . . . ", it was ". . . distortions of the truth . . . ", it ". . . conceal[ed] the truth in confusion . . . ", the " . . . facts are otherwise . . . " and " . . . Bagley's stories . . . are false." (App. 66, App. 71, App. 87, App. 92, and App. 100).[1] Plainly, those events as they unfolded are relevant,

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[1]The references herein are to the Appendix in Bagley's Petition for Writ of Certiorari, No. 86-921 rather than to the Appendix for IBP's Petition for Certiorari, because the pagination of the letter in the latter Appendix is erroneous and inconsistent with the trial record. Moreover, it should be noted that Page F-1 of IBP's Appendix is not part of the original letter as published by IBP and was apparently added as an afterthought for purposes of its petition.

essential, evidence in a trial to prove the falsity of IBP's defamatory letter.

This case goes back to the time of Bagley's firing in July, 1975, because Bagley was told at that time by an executive vice president to pack his files and leave. (Tr. 295-296). Bagley packed his files with the assistance of other IBP officers, and was observed by the vice president who had fired him. (Tr. 300-303; 1019-1022). Bagley did so as many other ex-officers of IBP had done when they left IBP, including Robert Peterson, the President of IBP and the signator of the defamatory letter, when he left IBP in the late 1960s. (Tr. 1142-1143). Finally, Bagley's actions in doing so were implicitly recognized by IBP's then general counsel as being consistent with the custom and habit of other officers of IBP. The General Counsel acknowledged this custom and habit when he described IBP's inability to produce a subpoenaed document in 1975 because several officers of IBP had since left IBP and taken their documents with them. (Tr. 2135-2136). These facts prove that IBP acted with "knowledge of falsity" when it said Bagley had stolen documents.

The focal points of the libel claim are each of the events identified in IBP's defamatory letter which characterized Bagley as an untruthful or unreliable person, to-wit: the misrepresentation of yields in the Cattle Pak pricing formula, the special preferential pricing relationship with Waldbaum, IBP's entry into the New York market, the quantity discount program, and the circumstances surrounding Bagley's removal of his documents from IBP when he was fired. IBP's letter defames Bagley in its

account of each of those events. Proof of a compensable libel as to any one of them is sufficient to affirm the libel judgment in favor of Bagley. Thus, the focal point of this case is not only the subcommittee hearing which was really nothing more than a collateral coincidence to the events as they were unfolding and, in the eyes of IBP, an opportunity to manufacture its claimed privilege.

In the Fall of 1976, Bagley became aware of the contents of a 1975 IBP formula pricing committee document because a then co-employee of his at Spencer Foods, Hans Aarsen, had taken his copy of the formula pricing committee documents with him when he left IBP in 1975. These ("Aarsen") documents explicitly revealed IBP's intent to price its product so as to force its competitors out of business. (Tr. 311-311A; 402-415, Bagley Exhibit 16).

Bagley, in November, 1976, was requested to meet with lawyers investigating IBP anti-trust activities. Bagley agreed to meet with those lawyers only after being assured by them that he could not withhold or cover up evidence of illegal activities. (Tr. 323-324; 415-420; 1709-1721; 1752). In those meetings, he explained only the documents that were necessary to understand IBP's pricing formula and how it could be used to effectuate IBP's stated objective of pricing its competitors out of business. (Tr. 325-330; 1726-1741). Thereafter, Bagley, under subpoena, produced the same documents to the Congressional subcommittee investigators. (Tr. 438; 478-483). Bagley never sought an audience with anyone; he never held a press conference or issued a press release concerning his knowledge or documents; and he never publicly or privately sponsored, supported, or advocated any legislation designed to affect the beef industry.

At the time of Bagley's testimony before the subcommittee, he was an employee of Dubuque Packing Company. At that same time, Dubuque and IBP had a business relationship. After Bagley had been subpoenaed by the subcommittee but before he testified, IBP, through three different officers, told Dubuque it was not happy doing business with Dubuque while Bagley was in its employ. (Tr. 490-91; 1686-87; 1813-1834; 2077-79). Bagley was fired by Dubuque within a week after after his Congressional testimony. (Tr. 492-496). The defamatory letter, dated August 1, 1979, was distributed by IBP beyond the membership of the subcommittee several days thereafter. (Tr. 712-721; Bagley Exhibit 12). Prior to his firing at Dubuque, Bagley had been constantly in demand within the beef industry because of his reputation, skill and expertise, but he was unable to find employment thereafter because he had been effectively blacklisted by IBP. (Tr. 386-397; 496; 503; 507; 587-588; 634-636).

Bagley then filed suit against IBP. In his suit, Bagley alleged and sought both compensatory and punitive damages for libel, invasion of privacy, tortious interference with employment, tortious interference with future or prospective employment and abuse of process. The genesis of the abuse of process claim was a 1977 lawsuit filed by IBP against Bagley and others alleging several million dollars in damages for injury to its business and reputation and seeking injunctive relief. (Bagley Exhibit 32). That 1977 case had been resolved by settlement and/or by voluntary dismissal as to all of the defendants except Bagley and as to all the claims against Bagley except the claim for injunctive relief. Bagley's abuse of process claim against

IBP was dismissed by the District Court prior to the commencement of the trial. IBP's 1977 lawsuit for injunctive relief against Bagley was consolidated for trial with the four remaining claims by Bagley against IBP, and both parties presented all relevant evidence in the prosecution and defense of these various claims.

The primary emphasis of the libel claim was on the IBP statements that Bagley "had stolen" and had committed perjury because those statements were the most outrageous, the most harmful, the most malicious, the most untruthful and, the easiest to prove. The libel claim, however, was not limited to those two remarks; nor was it limited to the original publication or distribution of the defamatory letter. Rather, the libel claim encompasses all of the libelous remarks about Bagley contained in the letter and includes each time the defamation was republished or redistributed.

Evidence in this consolidated trial included evidence of common law malice in support of Bagley's claim of punitive damages in his tortious interference claims. It was in this context that the trial took place. The jury returned separate verdicts for Bagley on each of his four counts, and the trial court entered judgment in favor of Bagley on three of the four claims pursuant to its ruling on post-trial motions, filed June 24, 1983.

On appeal to the Eighth Circuit, the libel judgment in favor of Bagley was reversed, the intentional interference with contract judgment affirmed, and the intentional interference with prospective contracts judgment conditionally affirmed. On December 2, 1986, Bagley filed his petition for a writ of certiorari as to the libel claim only. On December 9, 1986, IBP filed its petition for writ of certiorari.

ARGUMENT

I.

UNITED STATES SUPREME COURT HAS CONSISTENTLY HELD THAT THE FIRST AMENDMENT DOES NOT REQUIRE A PRIVATE-FIGURE LIBEL PLAINTIFF TO PROVE NEW YORK TIMES ACTUAL MALICE IN ORDER TO RECOVER COMPENSATORY DAMAGES.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974) the Supreme Court clearly enunciated the Constitutional limitations applicable to a private-figure plaintiff where the publication involved matters of public importance. IBP now claims that *McDonald v. Smith*, 472 U.S. —, 86 L.Ed.2d 383, 105 S.Ct. 2787 (1985), stands for the proposition that if a First-Amendment right to petition is involved, rather than other First Amendment rights or guarantees, then a defamation defendant is always afforded the protection of the *New York Times* actual malice standard, and the status of plaintiff as a private or public figure is of no consequence. There is no basis for such a distinction, and the issue has been decided by the Supreme Court consistently with the en banc decision of the Eighth Circuit.

In *McDonald, supra,* both the majority opinions of Chief Justice Burger and the concurring opinion of Justice Brennan conclusively establish that the First Amendment right to petition is afforded no higher status than other First Amendment freedoms. As Justice Burger stated, in *McDonald:*

> These First Amendment rights are inseparable, [citation] and *there is no sound basis for granting greater Constitutional protection to statements made in a peti-*

> *tion to the President than other First Amendment expressions. McDonald v. Smith,* 86 L.Ed.2d at 3930. (Emphasis supplied).

Justice O'Connor, writing for the majority in *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. —, 89 L.Ed.2d 783, 792, 106 S.Ct. 1558, (1986) stated that:

> When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern, but the plaintiff is a private figure, as in *Gertz,* the Constitution still supplants the standard of the common law, but the Constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern.

Thus, the Supreme Court decisions in *McDonald* and *Hepps,* reaffirm the *Gertz* distinctions between public and private defamation plaintiffs. The Supreme Court in *Gertz* concluded that states should be given significant leeway in providing a legal remedy to the defamed private individual. The Supreme Court thus left states largely free to develop standards of recovery applicable to private figures, limited only by the requirement that the states not impose liability without fault. *Gertz* also stands for the proposition that the focal point is the status of plaintiff in determining the applicable First Amendment rights to be afforded in a libel action.

To accept IBP's position would amount to a departure from all Supreme Court decisions since *New York Times* to *Gertz* to *Hepps.* The Eighth Circuit correctly applied the Constitutional principles established by the Supreme

Court in construing *McDonald v. Smith, supra.* Therefore, IBP's petition for certiorari as to this issue should be denied.

II.

THE EIGHTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S DETERMINATION THAT BAGLEY WAS A PRIVATE FIGURE.

IBP asks this court to focus on purely private matters in determining whether Bagley was a private or public figure in the context of this libel litigation. The only public issue or controversy involved here is the Congressional hearing in which Bagley was subpoenaed and testified. Bagley in no way thrust himself into any public controversy. He was merely a witness subpoenaed by Congress to testify and tell the truth.

A close reading of the dissent of Judge Fagg in the panel decision of *Bagley v. IBP,* 755 F.2d 1300, 1321 (8th Cir. 1985) demonstrably illustrates the basic reasoning as to why Bagley was determined to be a private figure in the context of this libel action. As Judge Fagg noted:

> A mere witness can hardly be said to play 'an influential role' in 'resolving' a particular controversy . . .

Judge Fagg also prophetically points out that to turn a mere witness into a public figure because of his testimonial appearance is

> remarkably harsh and ignores the valuable role [this individual] play[s] in our legislative process. This result [making him a public figure] will discourage citizens with relevant information from coming forward and, as a consequence, Congress will likely be deprived of a valuable source of information. *Bagley supra,* at 1321.

Bagley met with several attorneys investigating anti-trust activities in late 1977 and early 1978. These attorneys requested and obtained meetings with Bagley relevant to IBP's predatory pricing and other potential anti-trust activities previously carried on by IBP. These interviews involved purely private litigation and did not involve public issues or controversies. IBP learned of these private meetings and instituted suit against Bagley, the various lawyers involved and others. IBP, by instituting such an action, is not entitled to transform Bagley into a public figure through such litigation.

IBP's Petition for Certiorari as to this issue raises no controversy that should be subject to review by this court.

III.

AN INDEPENDENT REVIEW OF THE RECORD SUPPORTS THE TRIAL COURT'S JUDGMENT.

As Judge Fagg noted in his dissenting opinion in the panel decision:

> . . . After an independent review of the evidence [citation], I conclude that Bagley presented clear and convincing evidence of actual malice, *Bose Corp. v. Consumers Union of the United States,* 104 S.Ct. 1949, 1967 (1984). *Bagley, supra,* at 1320.

Bagley denies that the Eighth Circuit committed any error with regard to an independent de novo review. A de novo review supports the jury's determination of actual malice.

Bagley need only prove one false defamatory statement to be entitled to recovery, and if he proved any such

statement was published with actual malice, he is entitled to recover punitive damages under *Gertz*. A de novo review will establish that there was substantial evidence of actual malice. Further, an independent review will support the determination that Bagley was a private figure; that IBP's statements as against Bagley were false; that IBP knew that its libelous statements concerning Bagley were false; and that Bagley proved fault and falsity in the trial court.

With regard to the evidence introduced in the trial to prove actual malice, Bagley, by way of example, and not inclusively, cited to the Eighth Circuit and would cite to this Court, the following testimony:

1. Officers of IBP assisted Bagley in packing his documents and taking them with him. (Tr. 1034; 1142-45).

2. Officers of IBP testified that it was the custom and practice of officers who left the employ of IBP to take their documents with them. (Tr. 1259-65; 1300-1310; 1329-34; 970-74).

3. The general counsel of IBP acknowledged that it was the practice of officers to take documents with them when they left IBP's employ. (Tr. 2135-36).

Based upon this record, the jury rightfully found clear and convincing evidence of actual malice, since IBP, acting through its corporate officers, knew that Bagley had not stolen any documents.

A similar de novo review of the record with regard to IBP's allegations that Bagley lied and perjured himself when testifying before Congress will show that IBP knew such statements to be false. The documents generated by

officers of IBP while in the employ of IBP are in and of themselves sufficient proof to show actual malice on the part of IBP.

Bagley once again urges the Supreme Court to grant certiorari to review the issues submitted in Bagley's Petition for Writ of Certiorari. Upon review by the Supreme Court, Bagley would anticipate and welcome an independent review of the entire record under the directions of *Bose, supra.*

IV.

THE PARTIES IN THIS LITIGATION HAD A FAIR TRIAL.

In Sections IV and V of its Petition, IBP complains that it did not receive a fair trial. IBP misconstrues the opinions of the Eighth Circuit when it suggests that it left this issue unclear. (See P. 11 of IBP's Petition). Both the panel and the en banc court expressly rejected IBP's protestation that it was the victim of an unfair trial. There were no dissenters in the Eighth Circuit to this conclusion.

In the libel case, the dominant issues were whether Hughes Bagley was a liar, a perjuror and a thief and whether IBP falsely and knowingly accused him of such in its defamatory letter. The dominant issue in the tortious interference claims was whether IBP acted intentionally, maliciously and wantonly. By the very nature of the claims, the evidence presented was necessarily volatile. *Curtis Publishing Co. v. Butts,* 351 F.2d 702, 714 (5th Cir. 1965), Aff. 388 U.S. 130, 18 L.Ed.2d 294, 87 S.Ct. 1975 (1967); *Arnold v. Eastern Airlines, Inc.,* 681 F.2d 186, 198 (4th Cir. 1982).

There was no error in the trial court, the Eighth Circuit has unanimously held that there was a fair trial, and IBP's Petition for Writ of Certiorari as to this issue should be denied.

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CONCLUSION

For all of the foregoing reasons, IBP's Petition for Certiorari should be denied.

Respectfully submitted,

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